IN THE

Supreme Court of the United States.

OCTOBER TERM—1924, No. 362.

SECOND RUSSIAN INSURANCE COMPANY,
Complainant-Appellant,

—against—

THOMAS W. MILLER, as Alien Property Custodian, GUY F. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNEST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER and CARL CHRISTIAN STAHL, individually and as co-partners, doing business under the firm name and style of "H. Mutzenbecher, Jr.,"
Defendants-Appellees.

APPELLANT'S BRIEF.

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SUBJECT INDEX.

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Nature of the Appeal.

This is an appeal from a decree of the Circuit Court of Appeals (Second Circuit, 297 Fed. 404), affirming a final decree of the District Court (Southern District of New York; see Opinion, fol. 2719), dismissing the bill, after a trial, upon the merits (fol. 2755).

Statement of Facts.

The action was in equity under Section 9 of the Trading With the Enemy Act (Comp. Stat.

Anno. Supp. 1919, Sec. 3115½e), to recover certain moneys, seized by the *defendant* Alien Property Custodian from the deposit account of appellant with the *defendant* New York Life Insurance & Trust Company and now held by the *defendant* Treasurer of the United States.

The seizure was made January 13th, 1919 (fol. 26), upon the claim of the Custodian that plaintiff owed an amount equal to the sum seized to the *defendants* Behre, Mutzenbechers and Stahl, a German co-partnership [one of whose members, Behre, was a subject of Russia (fol. 2585) and an alien enemy in Germany (fol. 2700)], known and hereinafter referred to as Mutzenbecher, Jr., then alien enemies, residing and doing business as reinsurance agents at Hamburg, Germany, and not holding a license granted by the President. The moneys deposited with the Trust Company in the statutory trust fund are by the New York statute for the protection of United States policyholders and creditors of plaintiff (fols. 16, 27, 28, 29, 30).

Second Russian Insurance Company (hereinafter called the reinsurance company) was incorporated in 1835, its charter and by-laws being a statute of the Czar of Russia (fol. 4).

The reinsurance company established a "United States branch" in New York in 1913, pursuant to Section 27 of the Insurance Law of the State (see addendum A to this brief), for the purpose of conducting a reinsurance business (fol. 6). It complied with the statutes of New York, executed a trust deed in favor of and deposited with the New York Life Insurance & Trust Company, as statutory trustee (see addendum A), under the trust deed, $200,000 in currency and securities,

which it has increased from time to time (fols. 6, 12, 13, 2758).

Pursuant to the State Insurance Law, the reinsurance company, upon establishing the United States branch, appointed Meinel & Wemple, Inc., a New York corporation, as its United States manager and attorney-in-fact (fol. 147). The New York business of the reinsurance company was subject to a general agency contract between it and Mutzenbecher, Jr., for all countries throughout the world, except Russia, and including the United States and Germany.

Mutzenbecher, Jr., was a nominal stockholder for a small part of the total capital stock of $10,000 of the New York corporation Meinel & Wemple, Inc., but by agreement their stock did not enable them to participate in profits of Meinel & Wemple, Inc., for under the original plan of organization of this corporation, in 1913, the entire profits were payable as salaries to the three domestic stockholders, officers and directors, Messrs. Meinel, Wemple and Wilcox, who had theretofore been engaged as a New York co-partnership under the firm name of Albert Wilcox & Co in representing foreign reinsurance companies in New York (fol. 2826, Defts'. Ex. B, fol. 2821).

Mutzenbecher, Jr., was entitled, under the contract with the reinsurance company, by its terms continuing until the year 1925, to a commission of 3½% of gross premiums on all business done by the reinsurance company in the allotted countries, including the United States. Meinel & Wemple, Inc., as United States Manager and Attorney-in-Fact, agreed to receive for their services ⅜ of 1% of the gross premiums on American

business, plus their agency expenses, to be deducted from the general agents' 3½%.

Upon the establishment of the United States branch, treaties were entered into between the reinsurance company and direct-writing companies in the United States. The treaty companies reported to Meinel & Wemple, Inc., the United States Manager, upon bordereaux, showing the name of the insured, amount of the cession, the premium rate and location of the property. Meinel & Wemple, Inc., kept the accounts in New York, collected the premiums from the ceding companies, made the deposits with the trustee, pursuant to the New York statute, *i. e.*, the required reserved portion of the unearned premiums and transmitted the balance with bordereaux to the general agents at Hamburg.

The general agents, Mutzenbecher, Jr., had formed a pool for various companies represented by them at Hamburg, including the Second Russian, the members of which retroceded or reinsured with each other. So far as appellant's business was concerned, the duties of the general agents were to supervise the accounts of the sub-agents and attend to the retroceding for the Second Russian with the other members of the pool. For this purpose, they mapped and carded the business of the Second Russian and the other pool members at Hamburg, that is, made a continuing record of all insurances of the several companies represented by them, to be used to avoid overloading any one company in a particular location. These records were of cumulative value as the policies were for terms of from three to five years.

Upon the establishment of the British blockade in 1914, communication with Germany from the west became impossible. The blockade did not, however, extend to the north. The Mutzenbechers had relatives (fols. 2644, 2648), Thomas Clausen and Paul Clausen, at Copenhagen, Denmark (not Holland, as stated by the Court of Appeals) and commencing October 20th, 1914, up to October, 1916, Meinel & Wemple, Inc., at the request of Mutzenbecher, Jr., communicated with the German agents (Ex. H, fols. 2866-2870), through the Clausens at Copenhagen, as a mail-box (fol. 2656) by which means the necessary bordereaux and data were furnished to Mutzenbecher, Jr. (fols. 205-209). No bordereaux were furnished after October, 1916, and Mutzenbecher, Jr., thereafter could not keep up its work (fol. 2692). Clausen was not employed by appellant (fols. 759, 803, 783, 788, 797, 755). The United States manager was instructed by appellant to send no papers to Clausen (fols. 752; 864-865).

Stahl, one of the Mutzenbecher partners, testified that appellant knew nothing of the functions of Clausen in Copenhagen (fols. 2464, 2659).

The Russian Government on October 29th, 1916, promulgated a trading with the enemy law declaring contracts between Russian nationals and German nationals cancelled and commercial intercourse prohibited (fol. 2392). (For the convenience of the Court, we attach as Addendum B to this brief an English translation of the Russian decree taken from appellees' brief in the Court of Appeals.) Notice of this statute and of cancellation of the contract was given Mutzenbecher, Jr., as required by the Russian statute, service

being made through the Spanish Embassy (fols. 597, 2680).

Following the notice of cancellation of the Mutzenbecher, Jr., contract the reinsurance company appointed the New York corporation, Meinel & Wemple, Inc., theretofore sub-agents, general agents in New York and the business of the United States branch of the reinsurance company, under the existing treaties between direct writing companies and the reinsurance company, was thereafter continued by the reinsurance company and the corporation Meinel & Wemple, Inc., in disregard of Mutzenbecher's general agency contract (fol. 175).

At the date of the passage of the Russian Trading With the Enemy Act of October 29th, 1916, the United States was a neutral; but before the seizure (January 13th, 1919), and on April 6, 1917, entered the war allied with Russia, and Germany became a common enemy. Our Trading With the Enemy Act became a law October 6th, 1917 (40 Stat. 419; Comp. St. Anno. Supp., Sec. 3115½).

The theory of the seizure was that regardless of the effect of the Russian statute *in Russia and/or Germany* on the general agency contract between the reinsurance company and Mutzenbecher, it was wholly ineffective elsewhere; that Mutzenbecher, Jr., continued to be entitled to the general agency commissions on business done by the reinsurance company in New York between October 29th, 1916, and the date of seizure, less the commissions of the sub-agent Meinel & Wemple, Inc., to wit, $15,801.31, the sum seized from the Trust Company, the statutory trustee.

It is not disputed that all commissions accru-

ing prior to the date of the Russian ukase of October 29th, 1916, were fully paid to Mutzenbecher (fols. 268-271).

The Relations Between the Reinsurance Company and Mutzenbecher, Jr., Prior to 1916.

At the outbreak of the war in August, 1914, the reinsurance company domiciled in Russia and H. Mutzenbecher, Jr., domiciled in Germany became alien enemies. Thereafter the company handled all matters directly with the United States manager, having no communication whatever with Mutzenbecher, Jr. (fol. 749). The reinsurance company informed the Russian Insurance Department fully of its relations with Mutzenbecher, Jr. (fol. 746) and was told that the carrying out of the agreement as to the American business would not be considered an evasion of the then existing Russian laws relating to trading with the enemy (fols. 746-747). The Russian Government consistently maintained this attitude until October 29th, 1916 (see testimony of Mr. G. D. Talbot (fol. 477) and Mr. Nicolai Belotsvetov (fols. 1307-9)).

Until the ukase of October, 1916, the Russian Government permitted otherwise obligatory payments to Germans out of funds held abroad at the disposal of Russians (fol. 1308). There was no change in the relations of the reinsurance company and Mutzenbecher, Jr., so far as the business of the United States branch was concerned, save that remittances were made direct from Meinel & Wemple to the insurance company and commissions to Mutzenbecher, Jr. (fol. 749), until the ukase of October 29th, 1916, which, according to

the testimony of the Russian law expert, Romuald R. Sendzikowsky, had the legal effect of cancelling all contracts between Russian subjects and subjects of the German Empire (fol. 2393) wherever executed (fol. 2417) and prohibited all payments by Russians to Germans, even from money held in neutral territory (fol. 2413), all without the power of modification or exception on the part of the Russian Government (fol. 2430).

Subsequent to October 29, 1916, Meinel & Wemple, Inc., ceased all communications and relations with H. Mutzenbecher, Jr., as general agents for appellants (fol. 266). There is some testimony in the record as to the receipt of communications by Clausen for other companies in the pool (as at fol. 275) but not a word tending to connect appellant with Clausen in any way (fol. 330).

The Mutzenbecher firm at Hamburg was also general agent for the Salamandra Insurance Company of Petrograd, Russia, and for the Paternelle Insurance Company of Paris, France, for whom Meinel & Wemple, Inc., was also United States manager and attorney-in-fact. These two companies had also been admitted to do business in New York under the statutory provisions by the State for insurance companies incorporated by the laws of a country outside of the United States. The *Salamandra* and the *Paternelle* cases were tried with the instant case (fol. 129) with the result that a vast deal of the testimony appearing in the voluminous record now before the Court applies to the Salamandra and the Paternelle companies and not to the appellant Second Russian Insurance Company. This has been the

cause of some confusion. For instance, the Circuit Court of Appeals says in its opinion in the case (297 Fed. 404, 406):

> "In addition to Meinel & Wemple, Inc., they (H. Mutzenbecher, Jr.) were represented in New York by Mutzenbecher & Ballard. After the World War the latter firm changed its name to Sumner, Ballard & Company. Nearly all of the stock of this company was owned by H. Mutzenbecher, Jr., and four of its directors resided in Hamburg."

Sumner, Ballard & Company, successor of Mutzenbecher & Ballard, succeeded Meinel & Wemple as the United States managers and sub-agents for the *Paternelle Company*, and had no relations with appellant Second Russian Insurance Company or with Meinel & Wemple, Inc.

The Course of the United States Business Between October 29th, 1916, and the Date of the Seizure.

Following the passage of the Russian act of October 29th, 1916, and the notification of cancellation to Mutzenbecher, Jr., the reinsurance company sent Meinel & Wemple, Inc., from Petrograd, a new agency agreement, by which the latter was to become general agent in the place of Mutzenbecher, Jr., for the American business (fols. 152, 601, 606). This new contract did not reach Meinel & Wemple, Inc., until March, 1917 (fol. 175). No new treaties were ever made and the only business done was that received by Meinel & Wemple, Inc., from the direct writing

companies under their existing treaties with the reinsurance company appellant.

Under the new agreement, Meinel & Wemple, Inc., received the full commission of 3½% (less deductions not material here) of the gross premiums. It had before receiving the contract collected these commissions in full for six months subsequent to October 29th, 1916, and deposited them in *its general bank account* (fol. 360), but on its books opened a "suspense reserve account," on which was entered the difference between its former commission of ¾ of 1%, plus expenses, and the full commission of 3½%.

While this corporation had been acting as subagent from 1913 to October 29th, 1916, it had performed only the work incidental to the United States branch (fol. 213). It did not, however, and was not able to carry on the additional functions that had been performed by the general agents at Hamburg, to wit, the mapping and carding of the business, which is a necessary compiling of statistics to avoid the overloading of a fire reinsurance company in any given field and the necessary retrocession (or reinsurance of reinsured risks) of business where the results of mapping or carding give evidence of such overloading (fols. 213, 214, 686). Mutzenbecher, Jr., acted as a clearing house for the members of the American pool (fols. 831-833).

The gentlemen connected with Meinel & Wemple, Inc., were men of large experience in the fire reinsurance business with a full appreciation of the predicament of the foreign companies due to the war; the financial outlay necessary to enable the agency here to carry on the

portion of the work theretofore taken care of in Europe and the preparation therefor would have cost more than the total commissions would justify (fols. 360, 366). The mapping and carding records of the American business for the years 1913, 1914, 1915 and 1916 were in Germany and not available to Meinel & Wemple, Inc., or to the appellant, as they were in the possession of the Mutzenbechers in Hamburg (fol. 308). Meinel & Wemple, Inc., realized that without too great an outlay in the preparation of new maps and the creation of an organization to keep the mapping and carding up to date, they could not earn the full commission of general agents (fols. 308, 361-2). The course which they determined upon was one dictated by common sense, as well as a spirit of fairness. They did two things:

(1) Made inquiry of the reinsurance company as to how they should solve their problem (fol. 278); and

(2) pending receipt of instructions and the new contract entered on their books the "suspense reserve account" which was merely a book entry showing the difference between what they had earned as sub-agents and the usual commissions of the general agent for the work which Meinel & Wemple, Inc., had not done and was not able to do. The full 3½% commission was deducted by them and deposited in their general bank account (fol. 360). The "suspense reserve account" was set up on their books as a record of an amount subject to adjustment with the insurance company (fols. 360-365). It was the intention of Meinel & Wemple, Inc., to retain only such

money as it was entitled to (fol. 368), and when the suggestion came from the Alien Property Custodian that they might be reserving this money for the use of the Mutzenbechers, they withdrew the accumulated amount from their bank account, on July 26th, 1918, and deposited it with the New York Life Insurance & Trust Company, the statutory trustee of the reinsurance company (fol. 294), where it was subsequently seized by the Alien Property Custodian.

In placing this amount to the credit of the reinsurance company, Meinel & Wemple, Inc., stipulated that it should be released from the "extra services" the non-performance of which had given rise to their creation of the "suspense reserve account" (fol. 302), a stipulation to which the reinsurance company agreed (fol. 371).

As bearing on the good faith of the officers of Meinel & Wemple, Inc., see quotation, page 16, *post*. Furthermore, with reference to the acceptance by Meinel & Wemple, Inc., of the general agency for the *Salamandra* Insurance Company in place of H. Mutzenbecher, Jr., the District Judge said (fol. 2741):

> "I do not believe (from the mien and bearing of the surviving corporation officers) that such signature would have been given, without consulting Mutzenbecher, and I personally respect them in entertaining that belief."

The trial Court had in mind the death of Mr. Meinel and referred to the remaining officers.

From the establishment of the United States branch of the reinsurance company, until January

1st, 1915, Meinel & Wemple, Inc., collected premiums, made the reserve deposits in New York and remitted full commissions with a statement of their expenses to the general agents at Hamburg. The latter, after checking the accounts, remitted the sub-agents their expenses, plus ¾ of 1% commission (fols. 202, 235, 356-358). After January 1st, 1915, no remittances were made by Meinel & Wemple, Inc., until January 1st, 1916, between which latter date and October 29th, 1916, Meinel & Wemple, Inc., deducted their expenses, plus commission of ¾ of 1% and remitted the balance of the 2½% (by agreement, not 3½% as formerly) commission to Mutzenbecher, Jr. (fol. 358), by radiogram. The balance of the premiums not required to be deposited in New York were remitted direct to the reinsurance company in Petrograd after the war commenced.

The last remittance to Mutzenbecher, Jr., was November 22, 1916, covering the October premiums (fol. 271). There was no remittance to Mutzenbecher Jr., on premiums collected between November 1st, 1916, and the entry of the United States into the war, in April, 1917, or thereafter (fol. 359).

No bordereaux or data were furnished Mutzenbecher, Jr., subsequent to the ukase of October 29, 1916 (fols. 2692-2699), and the business of Mutzenbecher was completely demoralized by the war which drafted its clerks and some of its members (fol. 2702).

The contract from the reinsurance company to Meinel & Wemple, Inc., making them general agents, was received by the latter in March, 1917 (fols. 175, 2600, 2680, 2681).

Mutzenbecher's title, which the lower Courts have held was vested in the United States, is assumed to have arisen as follows:

Further performance of the general agency contract between the reinsurance company and the Mutzenbecher firm became illegal under the laws both of Russia and of Germany (fols. 2393, 569) as well as impossible because of the state of war. The Russian statute of 1916 cancelled the agency contract (fol. 2394) and the reinsurance company was "forbidden to enter into any agreement or any commercial connections whatever with subjects * * * of enemy countries" (see Addendum B). The claim now is that the parties then entered into an agreement to act in defiance of the law of their respective countries, law which was common to them as belligerents. The Court of Appeal says:

> "the Russian ukase was met" by an agreement between the parties for Meinel & Wemple, Inc., to act under "a colorable agency contract * * * arranging for H. Mutzenbecher, Jr., to continue their work and being paid out of the commissions allowed to Meinel & Wemple, Inc., under the colorable agency contract."

The claim now attributed to the Mutzenbechers, but repudiated by them at the trial, in plain language, is that an agreement was entered into involving treachery by each party to his government and that under this bargain a cause of action arose in favor of the German national enforcible in our courts and to which our government has succeeded.

The claim also involves, subsequent to the entry of the United States into the war and the passage of our Trading With the Enemy Act, disloyalty on the part of Meinel & Wemple, Inc., a theory repudiated by everybody connected with the case.

We refer to the decision of the District Court in the action of *Salamandra Insurance Company* v. *New York Life Insurance & Trust Company* (the New York statutory trustee of both the Salamandra and Second Russian Insurance Companies, the Salamandra Company being one of the Mutzenbecher "pooled" companies) reported in 254 Fed. Rep. at pages 852-856, where the Court says:

> "It appears that in June, 1918, the Custodian, through one of his agents, began an investigation of the office of Meinel & Wemple, Inc., for the purpose of ascertaining if said corporation held any enemy owned funds or property. Upon the completion of the inquiry it was suggested that the fund of $115,013.19 had been set aside for H. Mutzenbecher, Jr., and that there was a secret agreement or understanding whereby this fund would be turned over to Mutzenbecher, Jr., at the end of the war.
>
> "Upon the expression of such conclusion, Meinel & Wemple, Inc., placed at the disposal of the Custodian all of its books and papers and the statements of its managing officers and said corporation also notified the Custodian that it felt it its duty to the complainant to return the fund in question into the account held by the defendant under the trust agreement hereinbefore referred to.

> "No answer being received to this communication addressed to the Custodian, Meinel & Wemple, Inc., did deposit the fund with the defendant (New York Life Insurance & Trust Company) pursuant to the permissive terms of said trust agreement."

The Court, after deciding that under the Trading With the Enemy Act the determination of the Alien Property Custodian, made in good faith, entitles him to the possession of alleged enemy property, and that such possession will not be interfered with by injunction, said:

> "It is only fair to Messrs. Wilcox, Meinel and Wemple, who are the managing officers of Meinel & Wemple, Inc., to say that the conclusion which I shall reach must in no wise be taken as a reflection upon the integrity, the loyalty, and honor of these men, or any of them. There is absolutely nothing before me which will serve to impeach their character even remotely; indeed, from the affidavits on file, the conclusion is inevitable that they are men of high probity and unquestioned loyalty and devotion to this government and the position they have assumed is altogether consistent with such conclusion" (S. C. 254 Fed. 852-856).

The evidence at the trial repudiated the theory of a colorable agency contract now relied upon by the Government. Carl Stahl, a member of the German firm, testified that there was *no secret agreement or understanding* between appellant and Mutzenbecher, Jr.; that such rights as the latter might have had were based upon the pre-war agency contract (fols. 2676, 2677).

Stahl did not know of the new agency contract between Meinel & Wemple, Inc., and appellant, his information extending only to the agreement between them and another company (fol. 2649); and Mutzenbecher, Jr., specifically repudiated the cancellation of the Second Russian agency upon receipt of notice from the insurance company through the Spanish legation and denied the effect claimed by it for the Russian statute (fol. 2600).

Carl Stahl (one of the Mutzenbecher partners) testified that on account of the war it was impossible, for a number of reasons, for Mutzenbecher, Jr., to perform its part of the agency contract (fols. 2702-2703, 2694-2695, 2699). Defendants' law expert, Dr. Grossman, testified that German edicts forbade the payment of money to nationals of belligerent countries (fol. 569).

The witness Stahl stated positively that if Mutzenbecher, Jr., had any interest whatever in the money seized by the Alien Property Custodian, it was based on the ineffectiveness of the war and the Russian Trading With the Enemy Act, to terminate the rights of Mutzenbecher, Jr., under the pre-war contract (fol. 2676).

The questions raised by the appeal are:

(1) Did "the Russian ukase of October 29th, 1916, as a matter of law, terminate the contract and, therefore, the right of H. Mutzenbecher, Jr., to commissions under its contract with the (reinsurance company) appellant" (S. C. 297 Fed. 404, 408); and

(2) If the Russian ukase of October 29th,

1916, as a matter of law, terminated the contract, could the appellant and Mutzenbecher, Jr., make, in the United States or elsewhere, a contract under which Mutzenbecher, Jr., would have a lawful claim to commissions that could, as such, be seized by the Alien Property Custodian?

(3) Was the contract between the New York corporation, Meinel & Wemple, Inc., and H. Mutzenbecher, Jr., voided by the war between the United States and Germany and the war legislation of the United States? (S. C. 297 Fed. 404, 410).

The syllabus preceding the opinion of the Circuit Court of Appeals (297 Fed. Rep. 404) does not correctly digest the opinion of the Court. The argument of appellant was, as the opinion shows:

(a) That the Russian war-time legislation of October 29th, 1916, cancelled and prevented further performance under the general agency agreement between the Russian reinsurance company and Mutzenbecher, Jr., the German co-partnership at Hamburg, Germany; and

(b) That irrespective of the said Russian decree the entry of the United States into the same war and its Trading With the Enemy Act prohibited further relations between the German co-partnership Mutzenbecher, Jr., and the New York corporation, Meinel & Wemple, Inc.

Errors Assigned.

Appellant states that the decree of the Circuit Court of Appeals is alleged to be erroneous in holding:

1. That the Russian ukase of October 29th, 1916, did not terminate the agency contract theretofore existing between it and defendant appellee, Mutzenbecher, Jr.

2. That to give effect to the Russian uakse would be a refusal to follow the policies and principles of the legislative and judicial departments of our Government.

3. That to give the Russian ukase the effect of terminating the agency contract would not accord with the principles of our legislative and public policy.

4. That it would be contrary to the principles of comity to recognize the Russian ukase as terminating the contract.

5. That it was necessary to give extraterritorial effect to the Russian ukase cancelling the general agency contract between appellant and appellee, Mutzenbecher, Jr.

6. That the Russian ukase had no extraterritorial effect and did not operate as a cancellation of the agency contract between appellant and appellee Mutzenbecher, Jr.

7. In failing to find that all contractual rela-

tions between appellee, Mutzenbecher, Jr., and appellant were cancelled and annulled on or prior to October 31st, 1916.

8. In ignoring the principles of the law of nations by failing to give to said Russian ukase full faith and credence under the principles of national comity.

9. That notwithstanding the Russian ukase and the state of war then existing between the Russian and the German Empires, appellant entered into an agreement with a New York corporation with the intention of carrying on its former business with appellee, Mutzenbecher, Jr., under the terms of the former contract between them, cloaked and covered by an agreement with the New York corporation, for the purpose of evading the Russian ukase.

10. In holding that the agreement of October, 1916-March, 1917, between appellant and Meinel & Wemple, Inc., was void.

11. In refusing to give effect to the contract dated October 31st, 1916, between appellant and Meinel & Wemple, Inc.

12. In finding that Meinel & Wemple, Inc., were acting as agents for appellee, Mutzenbecher, Jr., in handling the United States business of appellant, subsequent to October 31st, 1916.

13. That the agency contract existing between appellee, Mutzenbecher, Jr. (a German national of Hamburg, Germany) and Meinel & Wemple,

Inc. (a New York corporation), was not voided by the war between the United States and Germany.

14. In not holding that the agency agreement between Meinel & Wemple, Inc., and appellee, Mutzenbecher, Jr., was voided by the passage of the Act of Congress of the United States, known as the Trading With the Enemy Act.

15. That the money seized by the Custodian from defendant, the New York Life Insurance & Trust Company, was the property of appellee, Mutzenbecher, Jr., and subject to seizure under the Trading With the Enemy Act.

16. That appellee, Mutzenbecher, Jr., was a creditor of appellant at the time of the seizure.

17. That appellee, Mutzenbecher, Jr. (a), had rendered services to appellant after October 29th, 1916; and (b) was entitled to compensation after that date by reason of the contract theretofore existing between it and appellant.

18. In reaching the decision upon which it based the decree appealed from, by interpreting as applying to appellant and so applying testimony which was pertinent only to the Salamandra Insurance Company and the Paternelle Insurance Company, respectively.

19. In disregarding the terms and provisions of the New York Insurance Law, Section 27, under which the defendant, New York Life Insurance & Trust Company, held the money seized.

POINTS.

FIRST.

Further performance of the agency contract between the Russian Corporation and the German partnership became impossible and illegal after October 29th, 1916, and both parties were excused therefrom.

The general rule of international law, common to all nations, is that commercial intercourse of every kind is forbidden between nationals of belligerent powers. *Watts, Watts & Co., Ltd.*, v. *Unione Austriaca Di Navigazione*, 224 Fed. 188; 229 Fed. 136; 248 U. S. 9; *Joring* v. *Harriss*, 292 Fed. 974.

The Russian insurance company was permitted, by special license of the Russian Government, to continue performance of the contract after the outbreak of war with Germany, in August, 1914, and until October 29th, 1916 (fols. 746-7). It continued to carry out the agreement until prohibited by its Government from continuing "existing contracts with enemy firms" (Addendum B, *post*). Further performance then became illegal and impossible, because absolutely interdicted by the laws of the countries of both contracting parties. In this situation, such being the law common to the belligerents and to the neutral forum, no action could have been brought here by the Mutzenbechers during the war (*Watts* case, *supra; Joring* v. *Harriss*, *supra*).

The lower Courts have ignored the Russian Act of October 29th, 1916, concededly of full force in Russia, saying it

> "can have no force or effect in the United States, unless our Courts, in applying the principle of comity of nations, give it such effect" (S. C. 297 Fed. 404, 409).

The Circuit Court of Appeals has thus stated the general rule as to the operation of foreign law on the *res* in the jurisdiction asked to apply it (*Barth* v. *Backus*, 140 N. Y. 230), or on the rights of citizens or persons under the protection of the laws of the forum.

But the Russian insurance company, appellant, never had birth or legal *sanction to exist* in this country at all. As a corporation, it never was here. It was created by the Russian Government, derived it existence and powers solely from that Government and could not change its domicile. It was permitted to transact business here, through an agent. Its legal death at the domicile would destroy that agency (except where coupled with an interest). As said by this Court, it could

> "make no contracts and do no acts, either within or without the state which created it, except such as are authorized by the law of its creation." *Bank of Augusta* v. *Earle* (13 Pet. 520, 584).

Inasmuch as the Russian Trading with the Enemy Act regulates the *power* of the corporation, that law had the same effect, wherever the corporation was permitted to do business through agents, as to the *power* of its agents, even as

had the statute under which the corporation was created and which was a part of its charter and the law of its existence. *Relfe* v. *Rundle* (103 U. S. 222); *Michigan Bank* v. *Gardner* (15 Gray, 362). The foreign jurisdiction may not enlarge the powers granted the corporation or its agents by the law of its birth. The law of the forum could not authorize a foreign corporation (or its agents) chartered to do fire insurance business to do a life insurance business; no more may it authorize such foreign corporation to make any other contract not authorized by the law of its existence.

The existence and the *powers* of any corporation going into a foreign jurisdiction to do business are at all times subject to the laws, present and future, of its creation and of its domicile; and, in addition, to the laws of the foreign jurisdiction relating to it (not enlarging its corporate powers) and the terms laid down by the foreign jurisdiction as the condition of allowing it to transact business in that jurisdiction. *Bank of Augusta* v. *Earle* (13 Pet. 519, 599, 589); *Demarest* v. *Flack* (128 N. Y. 205); *Hoyt* v. *Thompson Executor* (19 N. Y. 207); *Sinnott* v. *Hanan* (214 N. Y. 454, 458); *Martyne* v. *American Union Insurance Co.* (216 N. Y. 183, 196).

The provisions of the Russian Act of 1916 in no wise affected any right of any citizen within the United States or of any person within the protection of its laws. It was a part of the legislation of Russia for the protection of that nation's existence in a state of war with Germany, and

should be given effect in the United States. *Direction Der Disconto-Gesellschaft* v. *U. S. Steel Corp., et al.* (Opinion by this Court, Jan. 26, 1925).

As was said in the great case of *Canada Southern Railway Co.* v. *Gebhard* (109 U. S. 527):

> "A corporation of one country doing business in another country is subject to such control in respect to its powers and obligations as the government which created it may properly exercise. Every person who deals with it anywhere impliedly subjects himself to such laws of its own country affecting its power and obligations as the known and established policy of that government authorizes. Anything done in that country under the authority of such law which discharges it from liability there, discharges it everywhere."

The statement in the opinion of the Circuit Court of Appeals (S. C. 297 Fed. 404, 409):

> "To give effect to the Russian ukase cancelling and terminating the contract in question would be the refusal of our courts to follow the policies and principles of our legislative and judicial departments of government. The purpose of the (United States) Trading With the Enemy Act, with the creation of the Alien Property Custodian, was to seize such alien enemy owned property as is involved here."

is meaningless, if the effect of the Russian statute was as we have stated. If that statute was effective, there was no alien enemy owned property thereafter created to be seized. (*Direction, etc.* v. *U. S. Steel Corp., supra.*)

The policy of the legislative department of our Government in enacting the Trading With the Enemy Act was not for conquest; but to seize enemy owned property in this country and prevent the use, comfort and enjoyment of it to the enemy. There was no authority in the Act for the Alien Property Custodian to seize property which did not belong to an enemy and which the enemy itself could not have reduced to possession (*Stoehr* v. *Miller, Alien Property Custodian*, 296 Fed. 414); nor to hold the same against a lawful claim (*Miller, Alien Property Custodian* v. *Kaliwerke, etc.*, 283 Fed. 746).

SECOND.

Assuming, for this argument, that appellant and Mutzenbecher, Jr., did agree to continue the agency contract and make payments, in violation of the laws of Russia and of Germany, common to the law of the forum, such agreement remained executory; no action, legal or equitable, was maintainable thereon, and the funds seized were not subject to any claim in favor of Mutzenbecher, Jr.

The seizure was made by the Custodian as of title to a debt due from the reinsurance company to Mutzenbecher, Jr., vested in the United States by virtue of their Trading With the Enemy Act (fol. 50). Such property, so seized, vests *absolutely* in the Government and is not held as trustee for the alien. (*Munich Insurance Company* v. *First R. Insurance Company of Hartford*, 300 Fed. 345.) Nevertheless, the Mutzenbecher firm

was permitted to file an answer (fols. 64-99) and has been the most active defendant, making claim to the money seized, as stated by the Court of Appeals, on the ground

> "that the agency transfer (the appointment of Meinel & Wemple, Inc., in place of Mutzenbecher, Jr.) was not *bona fide*, but was taken to avoid steps which had been taken by Russia to put an end to commercial intercourse between subjects and citizens of that country and subjects and citizens of Germany" (S. C. 297 Fed. 404, 406).

It is further stated in the opinion of the Circuit Court of Appeals that the Russian Trading With the Enemy Act of October 29th, 1916,

> "was met by Meinel & Wemple, Inc., with full authority as agents arranging for Mutzenbecher, Jr., to continue their work, and being paid out of the commissions allowed to Meinel & Wemple, Inc., under the colorable agency contract." * * * "We are satisfied that the parties intended to carry on the former business with H. Mutzenbecher, Jr., under the terms of the original contract, cloaked or covered by sub-agency for the purpose of avoiding the Russian ukase" (S. C. 297 Fed. 404, 408).

The contract thus assumed was void because it involved a violation of law.

The Russian statute provided that those who infringe the decree

> "are subject to imprisonment during a period of two months to one year and four months, and besides to the payment of a

> fine of from one thousand rubles to twenty-five thousand rubles" (Addendum B, p. 43).

In *United States* v. *Lapene,* 17 Wall. 601, 84 U. S. 601, the Court, in holding that an agency legal when created was terminated by the hostile position of the parties, said:

> "All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one in person, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify discussion. No property passes and no rights are acquired under such contracts."

See, also:

> *Hanauer* v. *Doane,* 12 Wall. 342;
> *Davidson* v. *Lanier,* 4 Wall. 447;
> *Brown* v. *Tarrington,* 3 Wall. 377.

The continuance of the relation between appellant and Mutzenbecher, Jr., was permitted by the Russian Government until October 29th, 1916, on which date the permission was withdrawn and thereafter under the foregoing decisions the continuance of the relation was, by the very fact of the hostile position of the parties unsupported by express governmental license, completely terminated for all parties without regard to the effect of the statute outside of Russia.

The Russian statute forbade Russian subjects

> "to enter into any agreement or any commercial connections whatever with subjects,

> associations and companies of the enemy countries," * * * and cancelled "all existing relations by virtue of contracts with enemy firms" (Addendum B, p. 43).

The Russian statute was in the nature of a mandatory injunction on the powers of the Russian corporation. The existing contract between the parties was terminated thereby and the further performance or making of a new contract enjoined. *People* v. *Globe Mutual Life Insurance Company* (91 N. Y. 174).

We advert to the fact that a great portion of the record refers to the cases of *Salamandra* and *Paternelle Insurance Companies* (tried with the instant case, but not appealed) and has no application to the case of appellant, Second Russian Insurance Company.

The situation as to these companies differs. Appellant had, prior to the war, cancelled all of its contracts with Mutzenbecher, Jr., except that for the American business. After the promulgation of the Russian decree Meinel & Wemple, Inc., received a cable from Mutzenbecher, Jr., two months before the former had received the new contract of Second Russian Insurance Company (about which Mutzenbecher, Jr., knew nothing at any time, fol. 2649) and before the latter had received notice of cancellation of the Second Russian Insurance Company contract (fol. 2680), saying:

> "You may sign the contract which your company (Salamandra) will present to you" (fols. 252, 2664).

Mutzenbecher, Jr., had waived any right which it might have to commissions under the *Salamandra* contract after the notice of cancellation thereof by letter dated November, 1916, in accordance with the ukase of October 29th, 1916, basing its waiver upon its inability to further perform any of the services contemplated by the said contract (fols. 2702-3, 2694-5, 2699, 2800, 2808).

Defendants' witness Stahl, one of the Mutzenbecher partners, denied all knowledge of the appointment of Meinel & Wemple, Inc., as general agent for appellant. He knew only of the new contract between Meinel & Wemple, Inc., and the *Salamandra* Company (fol. 2649).

The reason for the waiver in case of the Salamandra (fols. 2674-5; Plaintiff's Ex. 7, fol. 2800) while claim was made against the Second Russian is explained by the testimony of defendants' witness Stahl. Mutzenbecher, Jr. had been advised by the agent and also by the attorney of the Alien Property Custodian after the Salamandra waiver, that if the Custodian could succeed in holding money seized from appellant's trustee, Mutzenbecher, Jr., "could have some hope of getting it" (fols. 2669-2670).

The claim of the Mutzenbechers has consistently been most positive that if they had any interest whatever in the seized money it was not based upon the new contract but on the ineffectiveness of the war and the Russian ukase to terminate their rights under the pre-war contract (fol. 2676). They knew nothing about the new contract with the Second Russian (fols. 2649, 2689-90). When they received, on March 14th, 1917, notice of cancellation through the Spanish Em-

bassy (fols. 2600, 2680), they immediately repudiated the idea that the old agreement was cancelled by that statute (fol. 2681). They considered the old contract in force (fol. 2624) under the advice of their lawyer (fols. 2629, 2667-8, 2677). The only new contract they knew about was that between Meinel & Wemple, Inc., and the Salamandra Company (fols. 2649, 2689, 2664, 2666).

These are the facts. Assuming, however, for argument:

(1) That appellant had a secret agreement with H. Mutzenbecher, Jr. Under the decisions, that agreement would be illegal and void, and no rights thereby vested in either party.

(2) That there was a secret and undisclosed intention on the part of the appellant to donate the fund in question to H. Mutzenbecher, Jr. If there is such a thing as an unexecuted gift, it conveys no rights whatever.

(3) That the officers of Meinel & Wemple, Inc., had the intention in the creation of the "suspense reserve account" to conserve the balance shown therein until such time as they might donate the same to H. Mutzenbecher, Jr.; that in doing so they acted under instructions from appellant, or that they acted without its knowledge and consent.

In the latter case, appellant could in no wise have been bound by the undisclosed intention of Meinel & Wemple, Inc., or by anything the latter might have done in furtherance thereof.

In either case, moreover, the fact remains that Meinel & Wemple, Inc., did not transfer the fund to H. Mutzenbecher, Jr., but did transfer the same to appellant either in satisfaction of a legal obligation or as an executed gift. Whether it was a gift or a transfer for consideration, it was executed and vested all rights to the fund, upon acceptance, in the appellant (*Stoehr* v. *Miller, Alien Property Custodian, supra*). If a gift to H. Mutzenbecher, Jr., had been contemplated (a transfer could, under the admissions of H. Mutzenbecher, Jr., have been nothing but a gift), it was never executed and, therefore, no right to the fund ever vested in H. Mutzenbecher, Jr. Meinel & Wemple, Inc., had no difficulty in transmitting funds to H. Mutzenbecher, Jr., during the existence of but prior to our entrance into the War, and had ample opportunity to transfer to H. Mutzenbecher, Jr., the accrued commissions if, acting either under instructions or on their own initiative, they had had any such intention. This assumption, then, like all the rest, is wholly untenable in the light of the undisputed facts.

It is denied by both Mutzenbecher, Jr., and the appellant, that a new contract was entered into between them after the ukase of October 29th, 1916, and there is no evidence in the record in contradiction.

The purpose of Meinel & Wemple, Inc., in setting up on their book the "suspense reserve account" is obvious in the light of all the circumstances. But assuming, for the sake of argument (as the Alien Property Custodian assumed), that it was with the *intention* of later delivering the

amount stated to Mutzenbecher, Jr., no title, legal or equitable, passed, whether the delivery was to be made as a gift or under an *executory* contract.

It need not be determined whether the seizure could have been sustained even had the money been found *in the possession of Mutzenbecher, Jr.*, in view of the unlawful nature of the contract under which it would have arisen. It is certain that no fiction of law as to implied contracts may be invoked in aid of title under an *executory* contract which existed, if at all, in contravention of the laws of the domicile of both the contracting parties, common to the forum.

Mutzenbecher, Jr., could have maintained no suit in our courts to recover the commissions, whether alleged to have accrued under the old contract or under the new, so long as Russia and Germany were at war (*Watts, Watts & Co., Ltd.* v. *Unione Austriaca, supra*; *Joring* v. *Harriss, supra*). It is clear that our Alien Property Custodian was empowered to seize only property possessed by, or reducible to possession by alien enemies except for disabilities growing out of *our* participation in the war.

It would indeed be an anomalous situation if the custodian under our own Trading With the Enemy Act could enlarge upon the rights of the alien enemy in order to sustain his right to seizure. That in effect is what the lower Courts have permitted in this case.

The monies in question were withheld and were being withheld from Mutzenbecher, Jr., by reason of the provisions of the Trading With the Enemy Act of a friendly power and by reason of the pro-

visions of our own Trading With the Enemy Act. Yet because of the Custodian's construction of the *intention* of the appellant or its agent to deliver the money to Mutzenbecher, Jr., when the Russian Trading With the Enemy Act (Oct., 1916-April, 1917) and later (after our entry into the War) our Trading With the Enemy Act, no longer forbade—an *intention* which Mutzenbecher, Jr., could not at any time enforce—the Courts below permitted the Custodian to sustain his seizure.

It is respectfully submitted that the right of the Custodian to seize funds as due under any fancied executory contract of Mutzenbecher, Jr., is only such right as Mutzenbecher, Jr., might have exercised and that under the circumstances disclosed neither Mutzenbecher, Jr., nor the Custodian had any rights in and to the monies seized.

The equities of the case at bar are clear. The appellant paid H. Mutzenbecher, Jr., during a period of more than two years when it was impossible for that firm to render any of the services contemplated by the contract. To take further money from appellant for the benefit of H. Mutzenbecher, Jr., or for the benefit of the United States, as for commissions subsequent to the termination of the contract, would be unjust.

Conclusions.

1. The Russian ukase of October 29th, 1916, cancelled the contract theretofore existing between appellant and Mutzenbecher, Jr., and nullified the right of the latter to further commissions.

2. After the declaration of war by the United

States against Germany, the right of Mutzenbecher, Jr., to continuing commissions would have terminated even if not previously nullified by the Russian ukase of October 29th, 1916.

3. The United States Trading with the Enemy Act would have voided the right of Mutzenbecher, Jr., to continuing commissions even if not previously terminated by the declaration of war by the United States against Germany.

4. The Russian ukase of October 29th, 1916, nullified the right of Mutzenbecher, Jr., to further commissions, not by extraterritorial operation, but as a law of the domicile of appellant corporation, limiting the powers of the corporation at its domicile and everywhere else.

5. The Russian ukase of October 29th, 1916, will be given extraterritorial force in the United States as the law of a friendly power, not affecting our citizens, in all respects in accord with our legislative and judicial policy and in all essential particulars, similar to our own trading with the enemy policy and legislative acts under which the Custodian seeks to sustain his seizure of the funds in question.

6. The purpose of the Russian ukase of October 29th, 1916, was to prevent financial aid to the enemy, a purpose which must be given effect by all friendly, neutral or allied powers.

7. If Mutzenbecher's right to commissions continued either under the old contract or under a contract entered into after October 29th, 1916,

the right to seize such commissions not actually in the possession of an enemy in and of the United States was a right which belonged only to the country of the domicile of the corporation creditor, which alone could declare such commissions forfeit to the government; and the denial of that right in the United States by seizure from the hands of the corporation or its agent, would be an act unfriendly to the government of the corporation's domicile.

8. If the funds in question had been found in the hands of Mutzenbecher, Jr., the seizure would have been valid; but so long as they remained in the hands of appellant or its agent, or the statutory trustee under the New York insurance law, they had been divested of their color of enemy title by the effective operation of the Trading With the Enemy Act of a friendly power, whose right to treat them as enemy property had been effectively exercised prior to the time when our own right attached.

9. Either the right of Mutzenbecher, Jr., to continue receiving commissions had been terminated by the Russian ukase of October 29, 1916, or else that right could not be terminated by the laws of the United States or any other country.

10. No right to the funds in litigation, legal or equitable, could, after October 29th, 1916, vest in Mutzenbecher, Jr., either under the original contract or by virtue of any contract entered into subsequent to the ukase of October 29th, 1916.

11. The right of the Alien Property Custodian is only that of Mutzenbecher, Jr.

12. The seizure of the funds in question by the Alien Property Custodian was without right.

THIRD.

The decrees appealed from should be reversed.

Dated, New York, February 16th, 1925.
1925.

Respectfully submitted,

ALBERT MASSEY,
Counsel for Complainant-Appellant,
No. 36 West 44th Street,
New York, N. Y.

Addendum A.

Section 27, New York Insurance Law.

Section 27. FUNDS AND CAPITAL WITHIN THE UNITED STATES OF CORPORATIONS ORGANIZED OUTSIDE OF THE UNITED STATES, TRANSACTING IN THIS STATE THE BUSINESS OF FIRE OR MARINE INSURANCE. 1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States, as follows: (a) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars deposited with insurance departments or state officers or so held in trust; (b) if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (c) if authorized to transact the business of both fire and marine insurance, four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insur-

ance departments or state officers or so held in trust.

2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. In addition to the reports required by law of such a foreign insurance corporation, it shall, not later than the fifteenth day of February in each year, file in the office of the superintendent of insurance a detailed statement, as of the thirty-first day of December next preceding, of the items making up such securities and other property so deposited and held in trust by a trustee or trustees and of the deductions to be made therefrom, signed and verified by the United States manager or attorney of such corporation, the items of the securities and other property held under trust deeds to be certified to by the trustee or trustees; provided that the superintendent may

also at any time require a further statement of the same kind and of such date as he may determine. The superintendent of insurance shall, on the filing of such annual statement, or from such examination as he may make of the affairs of such corporation, determine the amount of such capital as of the thirty-first day of December next preceding, and issue to such corporation his certificate of the amount of its capital as so determined; and, if it shall at any time appear that the capital for which the last certificate shall be outstanding has been materially reduced, the superintendent shall issue to such corporation a new certificate stating the amount of such reduced capital; provided that the capital so ascertained is not reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance.

3. Whenever it appears to the superintendent, from any statement made to him, or from an examination made by him or by an examiner appointed by him, that the capital of such a foreign insurance corporation is reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or of four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance, or that its assets are insufficient to justify its continuance in business, he shall determine the amount of such impairment or deficiency and

issue a written requisition to such corporation, through its United States manager or attorney, to make good the amount of such impairment or deficiency within such period as he may designate, not less than thirty nor more than ninety days from the service of the requisition.

4. That part of the capital of such a foreign insurance corporation required to be deposited with insurance departments or state officers shall be invested and kept invested as is required by the laws of the states where such deposits are made with regard to deposits by insurance corporations organized under the laws of a foreign country. The funds of such a foreign insurance corporation, other than its deposits, may be invested in such securities or other property as may be acquired and held by a domestic insurance corporation transacting the same kind or kinds of business.

5. When any part of the securities* or other property of such a foreign insurance corporation is held by a trustee or trustees, such trustee or trustees shall be appointed by the board of managers or directors of such corporation, and a duly certified copy of the vote or resolution creating the trust shall, with a duplicate original of the deed of trust, approved by the superintendent of insurance, be filed in the office of such superintendent. The trustees or trustee shall be either three or more citizens of the United States or a trust company authorized to execute trusts in a state where such corporation has applied for

*So in original.

authority or been authorized to do business, and must be approved by the superintendent of insurance. Such superintendent may examine such trustee or trustees, and the securities or property of such trust, and any books or papers affecting the same, in the same manner as he is authorized by this chapter to examine the affairs or funds of a domestic insurance corporation.

6. The superintendent of insurance may also receive for deposit from such a foreign insurance corporation securities or property in addition to the minimum deposit required by subdivision one of this section; but no such additional deposit now held by him or hereafter made with him shall be surrendered to such foreign insurance corporation unless the corporation's deposit with the superintendent of insurance after such surrender shall, at then market values, be at least equal to the deposit required to be made with him by subdivision one hereof. In case the deposit requirement of any state in which such foreign corporation shall at the time be transacting business is greater than the minimum deposit herein provided, the additional deposit shall not be surrendered except upon the written consent of the insurance supervising official of such state.

7. Such a foreign insurance corporation now or hereafter authorized to transact the business of fire insurance in this state may also be authorized to transact the business of marine insurance when and in case it has complied with subdivision one of this section. Such a foreign insur-

ance corporation now or hereafter authorized to transact the business of marine insurance in this state may also be authorized to transact the business of fire insurance when and in case it has complied with subdivision one of this section. Separate statements of the fire and marine business transacted by such foreign insurance corporation shall no longer be required or permitted.

Addendum B.

For the convenience of the Court we attach an English Translation of Russian Decree of October 29th, 1916.

TRANSLATED FROM RUSSIAN.

Extract from the COLLECTION OF DECREES AND ENACTMENTS OF THE GOVERNMENT edited by the Governing Senate.

October 29th, 1916, No. 302 CHAPTER FIRST.

Article 2382 Re interdiction of trade with enemy and certain neutral firms.

By decision of the Cabinet Council ratified by His Imperial Majesty under date of October 24th, 1916, it has been decreed that:

By virtue of Article 87 of Constitutional Laws of the Empire (Code of Laws, Vol. 1, part 1, edit. 1906), the following be decreed:

(1) Hereafter and until further enactment, all Russian subjects and any person, in general, re-

siding within the boundaries of the Russian Empire, as well as all trade and industry associations and joint stock companies established in Russia, are forbidden to enter into any agreement or any commercial connections whatever with subjects, associations and companies of enemy countries, as well as with any individuals, associations and companies of other foreign countries mentioned on special lists published to this effect. All existing relations by virtue of contracts with enemy firms must be considered as stopped from the date of promulgation of the present decree and with neutral firms—on expiration of one month's delay from the date of publication of said lists.

(2) The lists mentioned in the preceding article (1) are revised and confirmed by the Cabinet Council after being submitted to this Council by the Minister of Commerce and Industry and upon the previous agreement of the latter with the Home Department regarding insurance enterprises to be included in these lists, and with the Ministry of Finance regarding credit establishment. Duly confirmed lists are published in the Collection of Decrees and Enactments of the Government and in periodicals, in accordance with instruction of the Minister of Commerce and Industry.

(3) Those who would infringe to the interdiction stated in Article 1 of the present decree are subject to imprisonment during a period of two months to one year and four months, and besides to the payment of a fine of from one thousand rubles to twenty-five thousand rubles.

No. 449—The Russian Consulate General at Paris certify by these presents that the above is a true copy of the original unto this Consulate produced

Paris February 24th 1923

The Consul General

(LS) (Signed): AITOF

Consular fee 4 rbls-10 frs.

above signature of Mr. Aitof to be genuine.
above signature of Mr. Atof to be genuine.

Paris, February 24th, 1923

For the Chief Clerk Delegate For the Minister

(LS) (Signed): Eymery

Account Agent of the Ministry of Foreign Affairs

February 24th, 1923
Received 8 Francs
Receipt No. 100

I, the undersigned, certify that the above is a true translation of the original unto me produced. No. 13775 *"Ne varietur"*

Paris, March 2nd, 1923.

(Signed) SMOLSKI.

Authentications follows.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924—NO. 362.

SECOND RUSSIAN INSURANCE COMPANY,
Appellant,

v.

THOMAS W. MILLER, as Alien Property Custodian, GUY F. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL, individually and as co-partners, doing business under the firm name and style of "H. Mutzenbecher, Jr.,"

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR JAMES A. BEHA, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS STATUTORY LIQUIDATOR OF SECOND RUSSIAN INSURANCE COMPANY, UNDER NEW YORK INSURANCE LAW, SECTION 63, SUB-DIVISIONS 4 AND 5.

ALBERT MASSEY,
Counsel for James A. Beha, Superintendent of Insurance of the State of New York, as statutory liquidator of appellant.

THE COURT PRESS—47 West Street—Bowling Green 2820 Law Printers

Supreme Court of the United States,

OCTOBER TERM—NO. 362.

SECOND RUSSIAN INSURANCE COMPANY,

Appellant,

—against—

THOMAS W. MILLER, as Alien Property Custodian, GUY F. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL, individually and as co-partners doing business under the firm name and style of "H. Mutzenbecher, Jr.",

Appellees.

Brief for James A. Beha, Superintendent of Insurance of the State of New York, as Statutory Liquidator of Second Russian Insurance Company, Under New York Insurance Law (L. 1909, Ch. 33; Consol. Laws, Ch. 28, Sec. 63, Sub-divs. 4 and 5).

Statement.

Appeal from a decree of the Circuit Court of Appeals, Second Circuit (297 Fed. 404), affirming a decree of the District Court, Southern District of New York, dismissing the bill after a trial upon the merits.

The Facts.

The facts are stated in the brief heretofore filed and served on behalf of the appellant Second Russian Insurance Company and are not herein re-stated. Since the filing of the brief of appellant and the service on April 24th, 1925, of brief for Thomas W. Miller, as Alien Property Custodian, and Guy F. Allen, as Treasurer of the United States, the New York Supreme Court has, on April 24th, 1925, directed Hon. James A. Beha, as Superintendent of Insurance of the State of New York, to take possession, forthwith, of the property and conserve the assets of the Second Russian Insurance Company, pursuant to a petition duly presented on February 13th, 1925, to said Supreme Court by the Superintendent of Insurance, pursuant to the New York Insurance Law, Section 63, Sub-division 4.

Argument.

THE DECREES APPEALED FROM SHOULD BE REVERSED FOR THE REASONS STATED IN THE PRINTED ARGUMENT OF APPELLANT SECOND RUSSIAN INSURANCE COMPANY.

The Alien Property Custodian and the Treasurer of the United States by their joint brief filed herein and served April 24th, 1925, adopt the statement and argument of the special assistant to the Attorney General, as personal counsel for the defendants Mutzenbecher, Jr., to-wit: that "the right of the Alien Property Custodian to retain the funds seized, depends upon enemy owner-

ship, which, as presented by this case, is a question of fact and not of law."

The Superintendent of Insurance respectfully urges that the questions of fact attempted to be argued by the special assistant to the Attorney General as attorney for Mutzenbecher, Jr., are not presented by this appeal; that his argument disregards the question of law decisive of the case and duly presented by appellant, to-wit: the legal effect of the Russian statute of October 29th, 1916, cancelling and annulling the agency contract between the Russian corporation, appellant, and the German co-partnership, the respondents, Mutzenbecher, Jr. By decision of this question of law the facts argued by respondents become immaterial.

For the reasons stated in appellant's brief, the undersigned respectfully submits that the decrees appealed from should be reversed.

Dated, New York, N. Y., April 27th, 1925.

ALBERT MASSEY,
Counsel for James A. Beha, Superintendent of Insurance of the State of New York, as statutory liquidator of appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1924

SECOND RUSSIAN INSURANCE COMPANY, appellant
v.
THOMAS W. MILLER, AS ALIEN PROPERTY Custodian, Guy F. Allen, as Treasurer of the United States, New York Life Insurance & Trust Company, and Ernest Behre, Herman Franz Matthias Mutzenbecher, Franz Ferdinand Mutzenbecher, and Carl Christian Stahl, Individually and as Copartners Doing Business Under the Firm Name and Style of "H. Mutzenbecher, Jr.," appellees

No. 362

BRIEF FOR THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND GUY F. ALLEN, AS TREASURER OF THE UNITED STATES

STATEMENT

This is an appeal from a decree of the Circuit Court of Appeals (Second Circuit, 297 Fed. 404) affirming a decree of the District Court of the Southern District of New York dismissing the bill.

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THE FACTS

The facts as stated in the brief heretofore filed herein on behalf of the individual appellees, Ernest Behre, Herman Franz Matthias Mutzenbecher, Franz Ferdinand Mutzenbecher, and Carl Christian Stahl, are adopted as a correct statement of the facts as shown on the record. A restatement in this brief would be useless repetition.

ARGUMENT

From the beginning this case and the two cases tried jointly with it in the District Court of the Southern District of New York have been defended upon the same theory both by the Alien Property Custodian and the individual defendants.

The printed argument of these individual defendants addresses itself to the position maintained as well by the Alien Property Custodian. That argument is adopted in behalf of the Alien Property Custodian and the Treasurer of the United States and need not be repeated.

We respectfully submit that the decree of the lower courts should be affirmed.

JAMES M. BECK,
Solicitor General.
HARTWELL CABELL,
Special Assistant to the Attorney General.
APRIL, 1925.

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IN THE

United States Supreme Court

OCTOBER TERM, 1924.

No. 382.

SECOND RUSSIAN INSURANCE COMPANY,
Complainant-Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, GUY T. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL, individually and as co-partners doing business under the firm name and style of "H. Mutzenbecher, Jr.",
Defendants-Appellees.

BRIEF FOR APPELLEES ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL.

HARTWELL CABELL,
Attorney for Defendants-Appellees.

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In the

United States Supreme Court,

October Term, 1924.

No. 362.

Second Russian Insurance Company,
Complainant-Appellant,

against

Thomas W. Miller, as Alien Property Custodian, Guy F. Allen, as Treasurer of the United States, New York Life Insurance & Trust Company, and Ernst Behre, Herman Franz Matthias Mutzenbecher, Franz Ferdinand Mutzenbecher, and Carl Christian Stahl, individually and as co-partners doing business under the firm name and style of "H. Mutzenbecher, Jr.",
Defendants-Appellees.

BRIEF FOR APPELLEES ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL.

Statement.

This case, and two cases brought by the Salamandra Insurance Company, a Russian corpora-

tion, and La Paternelle Insurance Company, a French corporation, against the same defendants were tried together in the District Court. A judgment of dismissal was entered in each case. This is the only one of the cases which has been appealed, and the Circuit Court of Appeals for the Second Circuit unanimously affirmed the decision in the District Court.

The statement of facts contained in appellant's brief is so at variance with the case developed in the trial court, that a re-statement in this brief has been deemed necessary.

H. Mutzenbecher, Jr., a co-partnership with headquarters in Hamburg, Germany, had, for a number of years prior to the commencement of the European War in 1914, conducted a reinsurance general agency. They procured for themselves appointments as general agents for reinsurance for various insurance companies organized and operating under the laws of different states and nations. Their agency contracts generally covered portions of the globe outside the country under whose laws the several insurance companies represented by them had been organized and were conducting business. The Mutzenbechers transacted their business for these companies through sub-agencies which they established in the several countries of the different continents. The business was worldwide and consisted in reinsuring direct writing companies.

In the United States there were two Mutzenbecher sub-agencies, both located in New York City. One of them, Meinel & Wemple, was a New York corporation whose stock was owned partly by the Mutzenbechers and partly by three American citizens, William G. Willcox, Edward Meinel and William Y. Wemple, all of whom took active

part in the management of the New York end of the Mutzenbecher business. The reinsurance business in the United States of the Second Russian Insurance Company was done through this agent. It also handled the business of the Salamandra and Paternelle insurance companies whom the Mutzenbechers represented for reinsurance outside of Russia and France respectively.

The other New York agency (Sumner Ballard & Co.), handled for the Mutzenbechers the business of other insurance companies, reinsuring direct writing companies in America. The representation of these two agencies was entirely distinct and independent, but the testimony shows that the entire business done by both was pooled by the Mutzenbechers in Hamburg, together with business done through their sub-agencies in other parts of the world for the same companies. (Tr. pp. 73, 104, 309 et seq.)

The evidence shows that after the commencement of the European War, and up to the latter part of the year 1916 or early part of 1917, the business which had theretofore been conducted by the Mutzenbechers in the United States for their several companies, including the appellant, continued as theretofore with little or no change. Owing to the exigencies of the situation growing out of the blockade of German ports by the English fleet, there was a change in the matter of commissions due and payable to the Mutzenbechers and their sub-agents, Meinel & Wemple, under the contracts with the several companies. Prior to 1914 the Mutzenbechers were paid their commissions directly by the home offices of the several companies represented by them, including the appellant. The New York sub-agent forwarded to the Mutzenbecher firm their accounts showing

commissions due and expenses incurred, and were paid by the Mutzenbechers. After the blockade went into effect and communication between Germany and the United States became uncertain, the full commissions due to the Mutzenbechers upon the business done by them and their sub-agents was deducted from the premium receipts of the respective companies, including appellant, in New York. The sub-agents retained the amount due to them for services and disbursements, and up to a certain time remitted the balance to the Mutzenbechers at Hamburg by wireless. During the latter part of 1916, the practice again changed and no further remittances were made, the moneys being retained in New York. In the case of the Second Russian the funds seized by the Alien Property Custodian had been withdrawn by Meinel & Wemple from the funds of the Second Russian in their possession or under their control, the part belonging to them had been deducted, and the balance deposited in a different bank and set up on their books as a "Special Account" (Tr. pp. 80, 83).

During the year 1918 after the Alien Property Custodian had demanded an examination of the books of Meinel & Wemple, and while that examination was in progress Meinel & Wemple withdrew this special account and deposited it with the American trustee of the Second Russian Insurance Company (The New York Life Insurance & Trust Co.). At the same time they withdrew a similar special account which had been created with respect to the Salamandra business, and deposited that with the New York Life Insurance & Trust Company where the funds of that Company were also kept.

Upon demand being made by the Alien Property Custodian for these funds, a bill was then filed on behalf of the Salamandra Insurance Co. against the New York Life Insurance & Trust Company praying for an injunction restraining that Company from paying over any of the funds of the Salamandra Insurance Co. to the Alien Property Custodian, one of the grounds relied upon being that the funds in question having been mingled with the other funds of the Salamandra Insurance Co., and could not be segregated.

Upon the hearing, this bill was dismissed. (*Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.*, 254 Fed. 852).

The evidence showed that remittances had been made by Meinel & Wemple to the Mutzenbechers out of these special accounts practically up to the time the United States entered into the War. Thereafter, they were permitted to accumulate. The existence of the accounts was disclosed by the examination, and the demand of the Alien Property Custodian was not as stated in appellant's brief (p. 2), upon the claim that the plaintiff owed an amount equal to the sum seized, but as will be seen from the terms of the demand itself, set out in the amended bill of complaint (Tr. 6), was for the commissions which were "deducted and segregated from said premium receipts from time to time * * * by or under the order or at the instance of said Meinel & Wemple, Inc. as a 'Suspense Reserve Account' ".

On October 29, 1916 the Russian Government promulgated a decree by the terms of which contracts between Russian and German subjects were declared to be cancelled and commercial intercourse prohibited under penalties.

Shortly after the passage of this decree, proposed agency contracts, in the form of letters, were forwarded by each of the Russian companies, the Salamandra and Second Russian, to Meinel & Wemple. The proposal relative to the Second Russian will be found printed in the transcript, pages 926 to 933, both inclusive. The Salamandra proposal was identical in terms with that relating to the Second Russian, although the accompanying letter bore a different date, and it is quite evident that they were prepared by the same hand or that one was copied from the other.

The testimony showed that Meinel & Wemple had mailed formal acceptances of these contracts to the head offices of the respective companies, and the principal question of fact involved in the case, is whether these so-called transfers of agency from the Mutzenbechers to Meinel & Wemple were made in good faith and actually intended to be transfers, or whether the transaction in each case was colorable and done for the purpose of continuing business relations with Mutzenbecher, Jr., while at the same time appearing to have terminated all direct relations with that firm. A large part of the testimony adduced in the court below bears directly upon this question of fact.

Much of the testimony relied upon by the District Court in reaching its conclusion is to be found in Exhibits "D" and "F" which were offered in evidence at the trial, but by stipulation were not printed in the Circuit Court of Appeals record (Tr. 958, 959). These exhibits contain the examination of the officers of Meinel & Wemple, Inc. and the many letters and telegrams exchanged between Meinel & Wemple, Inc. on the one hand, and the Second Russian, the Mutzenbecher firm, and Mutzenbecher sub-agencies on the other. When read

together with the admissions of the officers of Meinel & Wemple, Inc. they form convincing proof of the facts as claimed by the defendants and as found by the court.

From this evidence, and the other testimony in the case which bears upon the good faith of the so-called transfer of agency, the following general method of doing business is shown;—

The American sub-agent, whom we shall refer to as Meinel, with the assistance of Mutzenbecher, solicited reinsurance treaties with various direct writing companies, both American and foreign, who were doing business in the United States. A treaty having been obtained, the treaty company proceeded to report to Meinel upon bordereaux, the individual cessions reinsured, showing the name of the assured, the amount of cession, rate of premium, location of property, etc. These bordereaux were forwarded by Meinel to Mutzenbecher in Hamburg. Meinel kept the accounts of each company upon data furnished from Hamburg, where the principal books of account were kept. In addition, Meinel looked after the trust funds in this country which were in charge of statutory trustees and drew up the reports required by law to be made for each company to the insurance officials in each state in which such company was authorized to do business. Up to the beginning of the European War, Meinel collected the premiums due from the direct writing companies, deposited these premiums in the bank accounts of the several reinsuring companies and held them or remitted them under instructions from Mutzenbecher. As already stated, after the War commenced, this method was changed under instructions from Mutzenbecher, with the consent of the several companies, by having Meinel de-

duct the commissions due Mutzenbecher instead of accounting to Mutzenbecher for the full premiums. From the sums so deducted, Meinel paid itself and either forwarded the balance to Mutzenbecher, or segregated it under a special account.

In the Mutzenbecher office at Hamburg, the business was mapped and carded (a method of recording), retrocessions were attended to, and all of the accounts of the companies with respect to their American business were kept.

It further appears from the testimony (Tr. pp. 104, 399), that the Mutzenbechers operated a pool whereby all of the business received by each of their companies who were pool partners, were thrown into a common pot together with all the expenses incurred in connection with such business, including agency commissions, and each company took a fixed percentage of the whole volume. If the operations of the companies as a whole showed a profit, this fixed percentage governed the extent of each company's participation in such profit. (Losses were treated in the same way.)

The importance of the work done in Hamburg is admitted by the witnesses for the plaintiff. In speaking of mapping and retroceding, the witness Edward Meinel stated (Exhibit "F", p. 16), that it was a vital part of the business. The witness Belotsvetov (Tr. 396, et seq.), gives an interesting account of the working of the business as conducted by Mutzenbecher, and emphasizes the importance of Mutzenbecher's work from the standpoint of the companies.

The commencement of the War in 1914 did not at first materially interfere with the transaction of the American business. A mail agent was appointed by H. Mutzenbecher, first in Holland, and afterwards in Copenhagen, through whom all com-

munications from Russia or America intended for Mutzenbecher in Hamburg, were transmitted. Bordereaux and other data in connection with the business continued to be forwarded by Meinel through this Copenhagen agent (Clausen), up to the passage of our Trading With the Enemy Act in October, 1917, and in fact, several messages were sent after that law had gone into effect.

The plaintiff contended that the transfer of the agency from Mutzenbecher to Meinel in the early part of the year 1917 was done in good faith and with a view of obeying the Russian law of October 29, 1916. The defendants below insisted, and the lower courts have found the fact to be, that the so-called contract between Meinel and the plaintiff was a mere colorable transfer, understood and intended between all the parties to be for the purpose of covering up a continuance of business relations between the Second Russian and Mutzenbecher. In disposing of this question, the Circuit Court of Appeals said (297 Fed. 408):

> "We cannot agree with the argument of the appellant that this agreement with Meinel & Wemple, Inc. covered only business then and thereafter prosecuted through Meinel & Wemple, Inc. On the contrary, we are satisfied the parties intended to carry on the former business with H. Mutzenbecher, Jr. under the terms of the original contract, cloaked or covered by sub-agency for the purpose of avoiding the Russian ukase. The various business activities and correspondence between Clausen and Meinel & Wemple, Inc., the method of prosecuting this reinsurance and retrocession business, all lead to this conclusion."

The evidence amply sustains this conclusion. The testimony shows that after the new agency

agreements were received by Meinel and accepted, there was no change in the method of transacting the business. (Exhibit "F", p. 101-2). The witness, Wemple, testified that it was practically impossible for them to transact the business without H. Mutzenbecher, Jr. (Exhibit "F", p. 97). Meinel & Wemple, with a contract entitling them to 3½% commission (the amount that had been paid to Mutzenbecher), continued to retain for themselves only ¾ of 1%, plus their expenses, which was the amount they were entitled to under their contract with Mutzenbecher. The balance was, as pointed out above, when it could no longer be transmitted owing to the war, carried in their own name in a suspense account in another bank. The plaintiff's witnesses moreover, freely admitted that by reason of the fact that the Mutzenbechers were in possession of the maps which contained a record of the business, and further by reason of the pooling arrangements which they knew to exist, Meinel could do nothing with respect to such business that it had not done as subagent. The making of a new set of insurance maps would have called for an expenditure of money which would have been prohibitive (Tr. p. 104), and even with complete maps, in the absence of a knowledge of the particulars of the Hamburg pool, and of the retrocession arrangements made in Hamburg, no retrocession arrangements could have been entered into by Meinel for the protection of the individual Russian companies represented in their office. Indeed, the witness Wemple, upon his examination by representatives of the Alien Property Custodian testified that it was practically impossible for them to transact the business without H. Mutzenbecher, Jr. (Exhibit "F", p. 97).

Appellant states in its brief (p. 29), that a large part of the printed record refers to the cases of Salamandra and Paternelle, tried simultaneously with this case and has no application to the case of the Second Russian. The testimony with respect to each of the companies is relevant on questions involving the acts of the others, because the proof is ample that they were acting in concert and under a common plan known to, and participated in, by the Mutzenbechers. So close was the accord, that five days before Meinel received from the Salamandra in Petersburg the so-called new agency contract, as to the forwarding of which it had to that point received not the slightest intimation, it received a wireless from Mutzenbecher in Hamburg, "You may sign agency agreement which you will receive from your company". (Exhibit 55 to Trial Exhibit "D"). The Second Russian contract, identical in terms, was not received until some months later, but upon receipt was accepted in the identical terms of the acceptance of the Salamandra contract.

Savitch, president of the Second Russian, testified that the Second Russian and the Salamandra, whose offices were across the street from each other, were in constant touch with respect to the American business, and that a letter written by one regarding that business was, to all intents and purposes, written by both. (Tr. 210, 239, 240). He further admitted receiving bordereaux, accounts, etc. from Clausen the Mutzenbecher "mail box in Copenhagen", after the so-called agency transfer, just as he had received them before. In fact, an examination of the record will show that not the slightest change was made in the manner of conducting the business after these

agency contracts had been received and accepted by Meinel. Bordereaux containing all the details of the business were regularly forwarded to Clausen so long as communication was open, and thereafter were made and retained in the New York office for delivery at some future date when such delivery could be made. The accounts of the several companies, including the Second Russian, were kept and forwarded to Clausen, map corrections, which were quite important in the recording of the business in Hamburg, continued to be forwarded, and the business in every detail went forward with the Mutzenbechers until the passage of the Trading With the Enemy Act by Congress in October, 1917.

If this Court considers the facts, the testimony at the joint trial of the three cases in the District Court will have to be considered in its entirety, and as has been pointed out, a most important part of this testimony does not appear in the printed record here before the Court.

ARGUMENT.

The right of the Alien Property Custodian to retain the funds seized, depends upon enemy ownership, which, as presented by this case, is a question of fact and not of law.

At the outset we confess a difficulty in comprehending appellant's argument. He starts by declaring it to be a general rule of *international*

law, common to all nations, that commercial intercourse of every kind is forbidden between nationals of belligerent powers. Statements to this effect can be found, but they are incorrect. It has been repeatedly pointed out both by courts and text writers, that this subject is not covered by international law, but is dealt with by each country through its municipal law, and the laws of the several civilized countries are by no means alike in this respect. In England and America commercial intercourse is forbidden, but in the continental countries generally the rule is the other way. There, such intercourse is uninterrupted until prohibited by law. The German law on this subject, and incidentally, the French law, is shown in the testimony of Dr. Grossman, a German lawyer called as an expert (Tr. 187, et seq.).

Our adversary's argument then proceeds to consider the legal effect of the Russian act of October 29, 1916. Having concluded that as a result of that act the contracts between Germans and Russians were, at least so far as Russia was concerned, annulled, the argument proceeds that since appellant here is a Russian corporation and exists in the United States only by fiction of law and the comity of nations, the doctrine announced by this Court in *Canada Southern Ry. Co.* v. *Gebhard* (109 U. S. 527), should be applied and the Russian decree should be given extra-territorial effect in the United States to the extent of a holding by our courts, that the money seized by the Alien Property Custodian could not belong to Mutzenbecher because the Mutzenbecher contract with the Second Russian had been annulled by law.

It may be said in passing, that the *Canada Southern* case, *supra,* dealt with a law directly affecting a corporate organization and intended by

the sovereign to control the corporation as such. Little difficulty can be found in enforcing such a law in a friendly country under the rules of comity, and that case has been extensively followed by the courts of last resort in other states in dealing with the powers and liabilities of foreign corporations. The Russian ukase under discussion, however, is addressed to individuals and all classes of trade and industrial associations and corporations, and apparently undertakes to deal with contracts of every kind, executory and executed. It is a criminal statute and if it means what it has been interpreted to mean, it is entirely at variance with our own public policy and is not entitled to enforcement here.

Bank of Augusta v. *Earle* (13 Peters 519).
Hilton v. *Guyot* (159 U. S. 113).
Russian Republic v. *Cibrario* (235 N. Y. 255).
Bradstreet v. *Neptune Ins. Co.* (3 Sumner 600).

If this were a case in which Mutzenbecher was seeking to compel the performance of its contract with the Second Russian or asking for damages for non-performance, this Court might well be called upon to consider the effect of the Russian decree as bearing upon the rights of the parties, although in that case, they would be faced with the difficult situation of determining whether a contract made and to be performed in Germany could be controlled as to the German party, by the law of the domicile of the other party.

Whether the Russian ukase prohibited the continuance of this contract or not, the business con-

tinued to be transacted between the parties and Meinel in New York, as the result of which certain moneys, as the courts below have found, were set aside as property of the Mutzenbechers. To hold that because the transactions out of which this profit to the Germans arose were prohibited by the laws of Russia; and that therefore these funds cannot be seized by the United States Government, is to hold that the fruits of an illegal venture are immune by reason of the illegality. The line of argument would seem to be that regardless of the intention of the parties, since the Second Russian was guilty of a fraud on its own government in continuing to transact this business with the Mutzenbechers through an indirect channel after the ukase of October, 1916, it can now defeat the seizure by the U. S. Government of the funds as enemy property by declaring that since it had no right to pay these funds to the Mutzenbechers, it can now elect to consider them as never having been paid and as therefore still belonging to it.

It might very well be, that if nothing had ever been paid, and if the Mutzenbecher profits remained in the form of a debt due from the Russian company, a collection of that debt would have been attended with considerable difficulty, but these funds were segregated and set apart, and as the courts below found, were set apart as belonging to the Mutzenbechers. The demand of the Custodian was for specific money, not a debt or credit.

To carry our opponent's argument a little farther, suppose the transaction out of which this fund arose had been between an American citizen and a German after war was declared and further commercial intercourse forbidden. Suppose the

profits to the German resulting from the venture had been segregated and deposited in good faith by the American partner in the illegal enterprise, the purpose being to permit it to remain so deposited until it could be safely transferred to the German. Suppose the Alien Property Custodian, having discovered these facts, seized the funds so derived and so deposited, as enemy property. Would the American partner be permitted to claim that since the entire transaction was illegal, it must be considered a nullity and he could reclaim the funds as his own which he had already segregated and delivered so far as possible, to his German associate?

The argument under the second proposition of appellant's brief (p. 26) commences with the statement "Seizure was made by the Custodian as of title to a *debt* due from the reinsurance Company to Mutzenbecher, Jr. vested in the United States by virtue of their Trading with the Enemy Act (fol. 50) • • • Mutzenbecher's firm was permitted to file an answer (fols. 64-99) and has been the most active defendant, making claims of money seized," etc.

As has been pointed out, the demand was for a definite fund that had been segregated by Meinel acting as the representative of Mutzenbecher with the express consent of the Second Russian. It was, therefore, in no sense the seizure of a *debt due*. It is true when it became evident to Meinel that a demand would be made for these funds as "enemy funds", and to evade if possible the seizure, Meinel without any instruction from the Second Russian, or from the Mutzenbechers, transferred the fund to the New York Life Insurance & Trust Company, who was the custodian

of the funds of the Second Russian. In dealing with this point in the Salamandra case (254 Fed. *852, 856*), where the same procedure had been followed by Meinel, Judge Knox said:

> "I am also of opinion that, granting for the moment that the determination of the Alien Property Custodian is correct as to the alien character of the fund in question (which fact I do not find), such alien character is not divested by reason of the mixing of the fund with another fund which unquestionably is impressed with a trust for the benefit of American policyholders of the complainant. A voluntary and gratuitous increase of a trust fund will not be permitted to continue to the prejudice of a third party, when the fund is of such nature that the voluntary and gratuitous increase may be followed and segregated, all without the diminution or impairment of any security theretofore held for the benefit of the *cestuis que trustent* of the original fund. A tainted fund may not be given immunity from the penalties attaching thereto by an unlawful and unauthorized mixture with a fund enjoying immunities."

The statement in the quotation from appellant's brief, that the Mutzenbechers are making claim to the money seized is misleading. The Mutzenbechers appeared as defendants and contended that the money seized was their money and should be retained by the Alien Property Custodian as enemy funds. Their contention is the same on this appeal.

It is submitted that the decree of the court below be affirmed, and that the funds remain in the hands of the Custodian until disposed of as Congress may direct.

Respectfully submitted,

HARTWELL CABELL,
Attorney for Defendants-Appellees, Ernst Behre, Herman Franz Matthias Mutzenbecher, Franz Ferdinand Mutzenbecher, and Carl Christian Stahl.

SECOND RUSSIAN INSURANCE COMPANY *v.* MILLER, ALIEN PROPERTY CUSTODIAN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 362. Argued April 30, May 1, 1925.—Decided June 1, 1925.

After promulgation, in the earlier years of the World War, of a Russian ukase forbidding, under penalties, all Russian subjects to enter into any agreement or commercial relations with citizens of enemy countries and proclaiming all contracts with enemy firms at an end, an arrangement was made between a Russian insurance corporation, a German firm of Hamburg, which was its general agent for reinsurance business including that originating in this country, and a New York corporation, which was the German firm's sub-agent here and shared the commissions on the American business, whereby, in form, the New York corporation was substituted as general agent and entitled to the full commissions on the net premiums it collected. Thereafter, and before the United States entered the war, the American agent collected premiums on old business, but, instead of appropriating the full commissions to which it was thus nominally entitled, retained only the percentage which it would have had under the old arrangement and deposited the rest in a special account in its name. Later, it turned over the fund to the insurance company's trustee under the New York law. The fund was seized by the Alien Property Custodian as belonging to the German firm. Two courts below having found from the evidence that the change of agency was colorable only, made to evade the ukase, and that the deposit was intended by all parties for the German enemies, *Held*, adopting that finding,

(1) That the agreement by which the commissions were set apart for the German firm was valid by the law of the United States, as it was also proven to be by the law of Germany. P. 558.

(2) That the insurance company, having consented that the German firm should have the commissions and they having been actually set apart accordingly, retained no legal interest entitling it to reclaim them from the Alien Property Custodian. P. 559.

(3) *Semble* that comity does not require that extraterritorial effect be given to the Russian ukase so as to make illegal, transactions had in the United States between the insurance company and the

New York corporation respecting their dealings with the German firm. P. 559.

(4) Assuming that the payment was forbidden by the ukase, no principle of comity would entitle the Russian company to recover it back; the rule denying relief when both parties to an illegal executed contract are *in pari delicto*, would apply. P. 561.

(5) A right to a fund in the hands of a depositary is not divested by the act of the latter in merely turning it over without consideration to a trustee holding other funds and securities for an adverse claimant. P. 562.

297 Fed. 404, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed the appellant's bill, brought under the Trading with the Enemy Act to recover money seized by the Alien Property Custodian, and held by the Treasurer of the United States, as the property of a German firm.

Mr. Albert P. Massey, for appellant.

Mr. Hartwell Cabell, with whom the *Solicitor General* was on the briefs, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appeal from a judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York, dismissing a bill in equity brought by the appellant, complainant below, under § 9 of the Trading with the Enemy Act (Act of October 6, 1917, 40 Stat. 419) to recover money seized and held by the Alien Property Custodian. 297 Fed. 404.

The appellant, a Russian corporation, in 1913 established an office in the State of New York for the conduct of an American reinsurance business in that State. In order to comply with the law of the State and to qualify it to do business there, appellant deposited with the New York Life Insurance & Trust Co., as trustee under a trust

pellant, which up to that time had continued its ordinary business relations with the Mutzenbechers, then found it necessary to terminate its relations with them, which it did, in form at least, by the appointment of Meinel, as its general agent, to effect reinsurance and to carry on the business which had previously been carried on by the Mutzenbechers at Hamburg. By the terms of this appointment Meinel was appointed general agent for the appellant, authorized to effect reinsurance for appellant's account, and to retain for itself as compensation for handling the business, commissions at the rate of 3½% of the net premiums received.

The principal question of fact presented for consideration by the courts below was whether this transfer of the general reinsurance agency from the Mutzenbechers to Meinel was made in good faith or whether it was formal only, and a mere cover under which the business was intended to be conducted by the Mutzenbechers as it had been previously conducted. On that question of fact, both the District Court and the Circuit Court of Appeals found for the Alien Property Custodian and against the appellant. That finding we adopt. The evidence was sufficient to support it and will not be discussed here, except insofar as it may be necessary to indicate what the legal relationship of Meinel to the Mutzenbechers was, so that the question of law presented here may be adequately dealt with.

No further remittances were made by Meinel to the Mutzenbechers after November 22, 1916, but it deducted from all net premiums received 3½% commission as stipulated by its agency appointment. Of the commission thus deducted it retained for itself a commission of ¾ of 1% plus its expenses and the balance was deposited in a special bank account in its name and carried on its books as a "suspense reserve account." The account remained undisturbed until July 26, 1918, when, the Alien

Property Custodian having begun an investigation of the books and records of Meinel, the fund which is the subject of this suit was then turned over by it to the New York Life Insurance & Trust Co., the trustee for appellant, and was by it later paid over to the Alien Property Custodian.

The inference drawn by the courts below from these facts and from voluminous testimony which need not be here reviewed was that the transfer of the agency from the Mutzenbechers to Meinel was merely colorable; that the commissions segregated in the suspense reserve account which were commissions from old business, that is, premiums earned under reinsurance treaties effected before the transfer of the agency, notwithstanding the formal terms of the written appointment of Meinel, were commissions to which Mutzenbecher was entitled under the contract or arrangement existing between Mutzenbecher, Meinel and appellant before the transfer of the agency and that Meinel had in fact received and set them apart as the property of the Mutzenbechers. These findings, so far as they relate to what the parties did in these somewhat complicated transactions, and the purpose and intent with which they acted, deal with questions of fact and, as they are supported by the evidence, they are controlling here.

The proposition of law which is presented, and on the basis of which we are asked to reverse the judgment below rests upon the asserted illegality of appellant's own conduct. It is argued that the effect of the Russian ukase of October 29, 1916, was to make unlawful the agency of the Mutzenbecher firm for appellant and all further relations between them; that the Mutzenbechers were accordingly not entitled to earn or receive further commissions even from "old business"; that the fund segregated in the suspense reserve account by Meinel was therefore at all times property of appellant and not subject to seizure by the Alien Property Custodian since the illegal conduct of ap-

pellant had prevented the acquisition of any rights in the fund or against the appellant by the German firm.

To sustain this proposition it is necessary for the appellant to maintain, (1) that it has retained some form of legal interest in the 3½% commission deducted by Meinel under the terms of its agency appointment of November 1916; and (2) that the Russian ukase should be given an extra-territorial effect such as to render the acts of the appellant within the United States, which were otherwise lawful and proper according to the laws of the United States, unlawful and void, and thus prevent the Mutzenbecher firm from acquiring any interest in the segregated fund.

We think appellant does not succeed in establishing either proposition. Although Meinel was the statutory agent of appellant in the State of New York and transacted there certain business for the appellant, it was also, and had been for many years before the outbreak of the war, the sub-agent of the Mutzenbechers in handling the business which was transmitted to the German firm to be distributed in the reinsurance pool. The commissions for this service were paid to Meinel by the Mutzenbechers. After the outbreak of the war it became their agent to receive and remit to them commissions for carrying on the reinsurance business for appellant. When the colorable transfer of the Mutzenbechers' agency was made to Meinel, it was accepted by Meinel only after it was authorized to do so by the Mutzenbechers. Appellant having formally authorized Meinel to deduct and retain 3½% commission for conducting the business, and Meinel having actually deducted and retained it, and the court having found that that portion of the commissions placed in the suspense account was placed there by Meinel for the benefit of the Mutzenbechers, with the knowledge and consent of the appellant, and they having formally claimed the segregated fund, we are unable to see that the appel-

lant is in any different situation with respect to this fund than it would have been if it had paid over the commissions directly to the Mutzenbechers or to their authorized agent.

At the time the agency was transferred to Meinel, the United States was at peace with Germany. The action of Meinel, an American corporation controlled by American stockholders, in taking over the German agency, did not violate any law or policy of the United States. It was not unlawful for it to stipulate that it should receive commissions for doing the business or to agree to receive them for the Mutzenbechers, and having received them, it was not unlawful for it to hold the commissions as the agent of the German firm for its account and benefit. Whatever view we take of the arrangement entered into by the appellant with Meinel, appellant can claim under it no ownership in the deducted commissions. By appellant's formal agreement with Meinel, it relinquished all claims to the commissions. By the secret understanding between appellant, Meinel and the Mutzenbechers, the segregated fund was received and held for account of the Mutzenbechers. Until the declaration of war by the United States against Germany, the Mutzenbechers in this state of facts could have maintained a suit against Meinel for an accounting and payment over of the segregated fund. *Hilton* v. *Guyot*, 159 U. S. 113; *Taylor* v. *Benham*, 5 How. 233, 274; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Kohler* v. *Board of Commissioners*, 89 Fed. 257, 260; *Pennsylvania Steel Co.* v. *N. Y. Central R. R. Co.*, 206 Fed. 663, 665; *In re Interborough Corporation*, 288 Fed. 334, 347.

In view of the legal relationship existing between Meinel and the Mutzenbechers and the legal consequences which flow from it, we find it unnecessary to speculate as to the precise meaning and effect of the Russian ukase. The Circuit Court of Appeals below rejected the conten-

tion that it should be given extra-territorial effect so as to make illegal the transactions had in New York between appellant and Meinel with respect to their dealings with the German firm. Certainly such an application of foreign law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined, the more so as the contract between a Russian and a German which we are asked to hold illegal on the basis of Russian law is shown by the expert testimony in the case to be valid according to the German law. The contention runs counter to the reasoning of such cases, as *Bank of Augusta* v. *Earle,* 13 Pet. 519, 598; *Hilton* v. *Guyot,* 159 U. S. 113; *Hervey* v. *R. I. Locomotive Works,* 93 U. S. 664; *Rose* v. *Himely,* 4 Cranch 241; *Polydore* v. *Prince* 19 Fed. Cas. No. 11257; *Dike* v. *Erie R. R.,* 45 N. Y. 113. Nor does *Canada Southern Ry. Co.* v. *Gebhardt,* 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this Court (*Modern Woodmen of America* v. *Mixer,* 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind. It cannot be brought within the purview of the rule established in *Canada Southern Railway Co.* v. *Gebhardt* and *Modern Woodmen of America* v. *Mixer, supra.*

If, however, it be assumed that its true meaning and purpose was to control extra-territorially, Russian sub-

jects, and that it not only imposed penalties on Russian nationals for its violation, but rendered unlawful and void all contracts and commercial intercourse within our own territory, between Russian nationals and Russian enemies, we still do not find in that assumption any basis for the reversal of the judgment below. Had the obligation of appellant to pay the commissions in question remained executory, the assumption that our courts should give an extra-territorial effect to the Russian ukase and disregard the German law affecting the rights of the Mutzenbechers upon their contract with appellant to be performed in German territory, might have been of some avail to it. But as we have seen, the findings of the court below establish that payment of the commissions was made as effectually as if the payment had been by cash in hand. When Meinel set apart the fund for the Mutzenbechers nothing further remained to be done by appellant with respect to the payment. It had relinquished all claim to the fund and Meinel held it for the Mutzenbechers. When the United States declared war, the fund was one held by an American national for the benefit of an alien enemy and on passage of the Trading with the Enemy Act (October 6, 1917), it became its duty to report the fund to the Alien Property Custodian (Trading with the Enemy Act, Section 7-a, 40 Stat. 416) and to surrender it to the Custodian on demand (Section 7-c, 40 Stat. 418).

To hold that money thus situated was not subject to the seizure and retention, under the provisions of the Trading with the Enemy Act, would be going very far; but quite apart from the operation of that Act, we find no basis for the contention that the principle of comity would require us to recognize any right in appellant to recover back the money thus paid because the payment of it was forbidden by the Russian ukase. No foundation

for it in the Russian law is suggested. By our own law payments made under contracts which are illegal where the parties are *in pari delicto* may not ordinarily be recovered. The law leaves the parties where it finds them and gives no relief. *Thomas* v. *City of Richmond,* 12 Wall. 349; *Higgins* v. *McCrea,* 116 U. S. 671, 684; *White* v. *Barber,* 123 U. S. 392, 423; *Dent* v. *Ferguson,* 132 U. S. 50; *St. Louis R. R.* v. *Terre Haute R. R. Co.,* 145 U. S. 393, 407; *Harriman* v. *Northern Securities Co.,* 197 U. S. 244, 294; *Barrington* v. *Stucky,* 165 Fed. 325, 330; *Levi* v. *Kansas City,* 168 Fed. 524. While there are exceptions to this rule, appellant's case does not fall within any recognized exception and the record suggests no special considerations of equity or of our own public policy which would justify an exception in this case.

We therefore reach the conclusion that the appellant was not entitled to recover the fund as against the Mutzenbechers. Such being the rights of the parties, while the fund remained in the hands of Meinel, their rights could not be altered to the prejudice either of the Mutzenbechers or that of the Government by payment over of the fund by Meinel to the trustee for appellant. The trustee was not a purchaser and could not take the fund free of the legal or equitable rights of the Mutzenbechers, *National Bank* v. *Insurance Co., supra,* although it might and did discharge itself under the provisions of the Trading with the Enemy Act by payment of the money over to the Alien Property Custodian. (Trading with the Enemy Act, § 7-e, 40 Stat. 418.)

The appellant establishes no right in the fund which is the subject of litigation; we find no error in the record.

The judgment of the Circuit Court of Appeals is

Affirmed.